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Our royal Supreme Court chains Fourth Amendment

By: Nat Hentoff – March 6, 2013

In the 47th paper of "The Federalist," James Madison grimly warned: "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

Increasingly, the majority of Chief Justice John Roberts' Supreme Court has chosen to ignore this fundamental constitutional separation of powers. In its Feb. 26 Clapper v. Amnesty International decision, the court, with a 5-4 ruling, rejected "a lawsuit challenging the federal law that permits broad, secret surveillance and interception of international communications (phones and emails) of communications involving Americans.

"The suit, brought by lawyers, journalists and human rights activists, charged that the 2008 amendments to the Foreign Intelligence Surveillance Act violate their rights to privacy and free speech" ("Unbridled Secrecy," The New York Times, Feb. 26).

This dragnet government surveillance encompasses non-Americans abroad suspected of involvement with terrorism in their communications with Americans, including here.

Meanwhile, the plaintiffs, through their specific occupations, have regular contact with these foreigners who may be on the government's anti-terrorism surveillance lists.

Thereby, Americans in contact with FISA targets have no rights under the Fourth Amendment, which requires that government searches be reasonable, based on probable cause and requiring warrants from federal courts. Under the FISA amendments, all of these individual privacy protections are absent.

Writing for the court, Justice Samuel Alito ruled that the plaintiffs have no standing to sue because they "have no actual knowledge of the Government's … targeting practices. Instead, (plaintiffs) merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired."

As Glenn Greenwald reasonably writes in The Guardian: "In the course of their work, (the plaintiffs) have cause to communicate regularly with people whom the U.S. government suspects are involved in terrorism. When combined with the U.S. government's technological abilities to spy on virtually every communication anywhere in the world, along with the government's proven propensity to eavesdrop on everyone it deems has anything to do with a terrorist group, it is a virtual certainty that the communications of these plaintiffs will be targeted" ("Supreme Court shields warrantless eavesdropping law from constitutional challenge," Glenn Greenwald, guardian.co.uk, Feb. 26).

So, as David G. Savage writes in the Los Angeles Times, the Supreme Court is acting as if King George III were still our commander in chief:

"The 5-4 decision is the latest of many that have shielded the government's anti-terrorism programs from court challenge, and a striking example of what civil libertarians call the Catch-22 rule that blocks challengers from collecting the evidence they need to proceed" ("Supreme Court rules out secret surveillance lawsuits," David G. Savage, the Los Angeles Times, Feb. 26).

Plaintiffs can't make their case because all the evidence is secret. So why do we need any recourse to the courts in such cases?

And dig this: "Over the last decade, the justices or lower court judges have repeatedly killed or quietly ended lawsuits that sought to expose or contest anti-terrorism programs, including secret wiretapping, roundups or arrests of immigrants from the Mideast and drone strikes that kill American citizens abroad."

Remember how the government has used the state secrets privilege to prevent lawsuits from even being heard?

If James Madison were here, he'd throw up his hands in shock! George Washington, too.

It's worth noting that joining Justice Alito in the majority of this barring of the Constitution are (no surprises here): Chief Justice Roberts, Justice Antonin Scalia, Justice Anthony Kennedy and Justice Clarence Thomas.

Writing for the minority was Justice Stephen Breyer — the high point of his judicial career, I would say — joined by Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor and Justice Elena Kagan.

(Female law students may take note of the gender loyalty to the Constitution in this case, but gender aside, Justice Sotomayor is an increasingly incisive and illuminating member of this court.)

Julian Sanchez, a research fellow at the libertarian Cato Institute, whom I, a senior fellow at Cato, continually learn from on these issues, recently reported on the court's decision: "The public has no idea just how broad the initial collection is … a New York Times report on 'overcollection' of domestic communications … suggests that a single authorization typically covers surveillance on hundreds or thousands of phone lines and email accounts, often in large 'blocks'" ("Further Thoughts on Clapper v. Amnesty International," cato.org, March 1).

As an interviewing reporter on this issue, I might be on a list in this case. And these actual plaintiffs need not necessarily even be on this authorization to be targeted.

"They might," Sanchez continues, "be using the facilities of a corporation or other entity that is a target, or flagged by 'link analysis' branching out from an initial target's account.'"

Are all those "targets" lawfully being denied their Fourth Amendment rights?

And under whose rule of law? We have four more years of Obama, but how many more of the Roberts Supreme Court?

Even if Obama doesn't have to fill vacancies, the Roberts court will prevail over the Fourth Amendment.

How many Americans — adults, or those still in school — even know there is a mandatory separation of powers in the Constitution?